FILED
SEP 15 1950
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM—1950

No. 305

JOSEPH FARINA, PETER DI PALERMO and DANIEL SPERDUTTO,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

VINE H. SMITH
Attorney for Petitioners, Joseph Farina and Peter Di Palermo

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Attorney for Petitioner, Daniel Sperdutto

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PETITION FOR ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

(In this Petition and annexed Brief numerals in parentheses unless otherwise noted refer to pages of the transcript of record.)

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated July 17, 1950, affirming (by a divided court) the judgments of conviction rendered herein against petitioners on November

22, 1949, by the United States District Court for the Southern District of New York.

In the Court of Appeals, the appellants were respectively represented by three different attorneys. For the purpose of applying to this Court for a writ of certiorari, the petitioner Farina was unable to employ counsel further. The attorney for the petitioner Di Palermo, who represented Di Palermo in the Court of Appeals, consented to represent also the petitioner Farina, being of the opinion that this application presents grounds for the issuance of a writ of certiorari available to all three of the defendants below, the petitioners herein.

Your petitioners note that petitioners' time within which to file a petition for the issuance of a writ of certiorari herein was duly extended to and including September 15, 1950, by an order dated August 14th, 1950, signed by the Chief Justice of the United States, and further represent to this Court:

FIRST: By an indictment filed May 6, 1949, in the office of the Clerk of the United States District Court for the Southern District of New York containing three counts, it was charged—

(a) In Count 1, in violation of U. S. Code, Title 18, Section 472, that on April 28, 1949, in the Southern District of New York, the defendants (the petitioners herein) "did keep in their possession and conceal" certain counterfeited United States Federal Reserve Bank of Chicago notes in the denomination of $10. each and certain other counterfeited Federal Reserve Bank of Chicago notes in the denomination of $20. each (6);

(b) In Count 2, that, on April 28, 1949, in the Southern District of New York, the defendants "did with intent that

the same be passed * * * as true and genuine, sell and deliver * * *" such counterfeited Federal Reserve Bank of Chicago notes, in violation of U. S. Code, Title 18, Section 473 (6-7);

(c) In Count 3, that, from an unknown prior date up to and including the 28th day of April, 1949, the same defendants, in violation of U. S. Code, Title 18, Section 371, conspired to violate U. S. Code, Title 18, Sections 472 and 473 by keeping in their possession and concealing with intent to defraud and to sell the same, and by selling, counterfeited Federal Reserve Bank of Chicago notes (7-8).

SECOND: After trial before Honorable Sylvester J. Ryan, District Judge, and a jury, Farina and Di Palermo were found guilty under all three counts; Sperdutto was found not guilty under the first count, the charge of possession, but was found guilty under the second count for selling, and under the third count for conspiring.

The sentences in all three cases were, in the aggregate, the same, imprisonment for fifteen years. This result was reached as follows: Farina and Di Palermo were each sentenced to fifteen years under Count 1, ten years under Count 2 and five years under Count 3, all to run concurrently. Sperdutto was sentenced to imprisonment for ten years under Count 2 and five years under Count 3, to run consecutively (4). No opinion was rendered by the District Court.

THIRD: All three of the defendants below, the petitioners herein, appealed from the judgments of conviction to the United States Court of Appeals for the Second Circuit. The appeal was argued before that court on June 7, 1950 and its decision of affirmance was rendered on July 17,

1950 (677). The Judges constituting the court were Circuit Judges A. N. Hand, Clark and Frank. Judges A. N. Hand and Clark concurred in the majority opinion for affirmance (677-682). Judge Frank voted for reversal and filed a dissenting opinion (682-687).

This decision at the time of the signing of this petition has not been reported. The prevailing and dissenting opinions appear in the record (677 *et seq.*).

Jurisdiction

FOURTH: The original jurisdiction of the United States District Court in this case is based upon the statutes referred to in the indictment, *viz.*, U. S. Code, Title 18, Section 371, the Conspiracy statute, and Sections 472, 473, the statutes relating to counterfeiting. The jurisdiction of this Court to issue a writ of certiorari to review the judgment of affirmance rendered by the Court of Appeals is invoked under U. S. Code, Title 28, Section 1254 (formerly Section 347) and Rule 38 of the Rules of this court.

Statement of the Matters Involved

FIFTH: The matters involved herein are questions of law, the most important of which arise in connection with instructions given by the trial judge respecting the presumption of innocence and the nature of reasonable doubt. It was in respect to these questions that the judges of the Court of Appeals differed. As regards like instructions, the decisions in different circuits are admittedly in conflict. (See opinions herein, 681, 684-685.) The instructions in question follow:

(a) The court's charge as to the presumption of innocence included the following:

"It was designed for the protection of the innocent. It was not intended as a bulwark behind which the guilty might hide" (613-614).

Obviously, the presumption, if it is to protect the innocent or to function at all, must apply to every accused, and, accordingly, a similar instruction was held to constitute prejudicial error by the Court of Appeals for the 5th Circuit.

Gomila v. *U. S.*, 146 F. 2d, 372, 373.

(b) In his definition of reasonable doubt the trial judge included the following:

"It is a doubt for which a juror who says that he has such a doubt about a defendant's guilt, can give a reason for entertaining" (614, fol. 1840).

Such an instruction has been criticized in various circuits, including the Second, and is definitely ground for reversal in the Eighth Circuit. See opinion of Judge Walter H. Sanborn in *Pettine* v. *Territory*, 201 Fed. 489, 495-496.

Questions Presented

Whether the Appellate Court erred in affirming the judgment of the trial court which charged the jury that

(1) *The presumption of innocence was designed for the protection of the innocent and that it was not intended as a bulwark behind which the guilty might hide* (613-614);

(2) It (a reasonable doubt) is a doubt for which a juror who says that he has such a doubt about a defendant's guilt, *can give a reason for entertaining* (614, fol. 1840).

Reasons for Issuance of Writ of Certiorari

SIXTH: Special reasons for the writ of certiorari in this case are the following:

1. The decisions in different circuits are conflicting as respects the propriety of such instructions as the trial court gave respecting the presumption of innocence and reasonable doubt.

2. It is a matter of public importance that these differences of opinion be set at rest by a decision of this court, because the questions involved are fundamental and arise in every criminal case. As to the former question, the scope and character of the presumption of innocence, a special importance arises from the confusion—amounting virtually to a further conflict in the views obtaining in different circuits—as to how far the opinion of this court in the case of *Coffin* v. *U. S.*, 156 U. S. 432 has been modified (*Agnew* v. *U. S.*, 165 U. S. 36; *Holt* v. *U. S.*, 218 U. S. 245) and how far it is still controlling.

In some decisions, *e.g.*, *Dodson* v. *U. S.*, 23 F. (2d) 401 (Judge Parker), the *Coffin* case is cited as authority in substance and modified only as to terminology. In other cases it appears to be considered that the charge as to presumption of innocence is no longer required.

In this connection, attention is called to the circumstance that two eminent students of the Law of Evidence and Proof, who were among the earliest commentators upon this Court's opinion in the *Coffin* case, appear to confine their deprecation of that opinion to matters of terminology, especially to its characterization of the presumption of innocence as constituting "evidence in favor of the accused" (156 U. S. at 460).

Thayer, *Preliminary Treatise on Evidence*, pp. 559, 563, 565, 571, 572, 576;
Wigmore on Evidence, 3rd Ed., Sec. 2511.

WHEREFORE, your petitioners respectfully pray that the writ of certiorari be issued out of and under the seal of this Court addressed to the U. S. Court of Appeals for the Second Circuit, directing that court to certify and send to this Court for its review and determination on a day to be named in such writ, a full and complete transcript of the record and all proceedings of such court herein, being the case entitled in said United States Court of Appeals for the Second Circuit, as follows:

"UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
C129-338

UNITED STATES OF AMERICA,
Appellee,

—v.—

JOSEPH FARINA, PETER DI PALERMO and DANIEL SPERDUTTO,
Appellants,"

and that the judgment of said Court of Appeals be reversed by this court, and that petitioners have such other and further relief as to this Court may be proper.

Dated September 15, 1950

VINE H. SMITH
Attorney for Petitioners,
Joseph Farina and Peter Di Palermo

PETER L. F. SABBATINO
Attorney for Petitioner,
Daniel Sperdutto

Supreme Court of the United States

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Respondent.

PETITIONERS' BRIEF

Facts

The evidence upon which the Government relied to establish the offenses charged in the indictment against the three defendants was as to each of the defendants different and in large measure wholly disconnected.

Farina testified, admitted that he met Secret Service Agent Lowery in February, 1949, had several interviews with him and, at Lowery's request, finally, two months later, on April 28, 1949, procured for him $10,000 in counterfeit Federal Reserve bills and sold them to Lowery for $1300.00 in genuine U. S. currency (403-4). Farina's defense was entrapment. On the Government's testimony, as well as on Farina's, the Secret Service Agent, posing as a seaman, sought out Farina through "Phil," another undercover individual, also posing as a seaman, and

asked Farina to procure the counterfeit currency. Much of Farina's testimony as to the dealing that ensued is uncontradicted, as will presently be noted, and a real issue as to entrapment was clearly presented.

As to Di Palermo and Sperdutto, the evidence is wholly circumstantial and, as to each, a wholly different set of circumstances is relied on by the Government to sustain the conviction.

Di Palermo was a proprietor and the manager of DiPolo's Bar and Grill at 40 East 19th Street (211, 433-4, 1474). He had been operating a restaurant for several months, but his bar and grill license was actually issued on the day of the arrest, April 28, 1949 (211). No business was being done in the bar (32, 35). At the time of the transfer of the counterfeit currency to Agent Lowery by Farina and the payment by Lowery to Farina of $1300.00 in genuine United States currency, Di Palermo and a juke-box salesman, the Government's witness Gochman, were seated alone in the unlighted bar room, arguing about the terms upon which a juke box should be installed (120, 212). While this was happening, certain officers arrested Sperdutto and Farina outside the restaurant and brought them in (119-20), Farina, ten minutes or more later than Sperdutto, because Farina fled and had to be overtaken (161). Certain officers who came in testified that they saw Di Palermo drop a package of money which proved to be the $1300.00 in genuine bills, and that one of them immediately picked up the money at Di Palermo's feet (121-2).

The crux of their testimony is that this happened immediately upon their entrance into the bar room. The Government's witness Gochman and the disinterested witness Rubin, the meat salesman called by defendants, and others, contradicted this statement (216-17). Gochman testified that the money did not make its appearance until both

he and Di Palermo had been searched (216) and he was not certain whether it was before or after Farina had been brought back to the restaurant (220-1). Rubin and other witnesses testified that the officers were bustling about both the bar room and the rear room and the restaurant looking for the "buy" money (439-445). Farina's testimony was that he had the money with him when he fled and that after he was brought back to the restaurant he dropped it on the floor (406).

Di Palermo was doing, apparently, a good business in the restaurant. He had on his person $2300.00 in currency which admittedly had no connection with the counterfeit episode (124, 155). $1400.00 of this was to be paid to the meat salesman Rubin (435). Between him and Di Palermo there had been a disagreement about the quantity of meats which had previously been delivered.

Moreover, according to Agent Lowery's own testimony Farina had indicated to him, in his conversation preceding the exchange of the counterfeit for the genuine notes, that he knew the proprietor of the place and he, therefore, cautioned Lowery (whom he then supposed to be a seaman) to be careful not to let the proprietor know what was going on (41).

As to Sperdutto, the evidence shows no more than acquaintance and association with Farina. There was no evidence of anything pointing to his actual familiarity with what was going on. The majority opinion of the Court of Appeals speaks of Sperdutto's "flight" from the scene of the crime. The evidence shows affirmatively that he neither fled nor attempted to do so. As Farina started to drive away, Sperdutto got out of the automobile into the roadway and then started walking towards Broadway.

Sperdutto, when taken into custody, at once stated to the arresting officers that he was at the Bar and Grill to discuss business with a butcher (175). Government wit-

nesses admitted that he so informed them and that there was a butcher present in the premises at the time of the arrest (174), but they admittedly failed to question the butcher to verify Sperdutto's protests (175, 176). The butcher confirmed the statements of Sperdutto under oath at the trial (434, 446, 449).

Upon the record, therefore, it is manifest that there were real questions of fact as noted in the dissenting opinion of Judge Frank in the Court of Appeals.

POINT I

The Court's instructions as to the presumption of innocence and reasonable doubt were clearly erroneous and prejudicial.

As to these instructions, petitioners' argument and citation of authority may be abbreviated since they are reflected and further documented in Judge Frank's dissenting opinion. The prevailing opinion hardly undertakes to justify these instructions but declines to reverse on the ground that the evidence was "ample" and that the jury could not have been misled (680-681). The conflicting evidence, however, discloses that there were definite issues of fact as to the guilt of each of the defendants. The suggestion that the jury could not have been misled is succinctly dealt with in Judge Frank's comment that the defendants, whose liberty is at stake, should not bear the risk of the jury's actually being misled by such erroneous and confusing instructions (686). We suggest further that, if the effect of such instructions is not to cloud or to blunt the cautionary principle which underlies both the presumption of innocence and the requirement of proof beyond a reasonable doubt, why are such instructions given at all? Why was it necessary or appropriate for the trial judge to

qualify his charge as regards presumption of innocence and reasonable doubt by these instructions indicating that the presumption of innocence is inapplicable to "the guilty" or that a juror should not consider his doubt reasonable unless he is prepared to formulate an explanation of it? The effect of the charge was to place the burden upon the jury of *first* finding the defendants innocent *before* giving them the benefit of the presumption of innocence.

In the interest of concise statement, the petitioners, without further elaboration, rely upon the authorities to which attention has already been called in the foregoing petition (pp. 5-6, *ante*) and to the reasoning and authorities in Judge Frank's dissenting opinion, excerpts of which follow (684-6):

My colleagues' opinion in this case illustrates, I think, the second point. For the faulty "presumption of innocence" instruction—that the presumption was "designed for the protection of the innocent" and was "not intended as a bulwark behind which the guilty might hide"—may easily have misled the jury, to the grave prejudice of the accused. We do not know whether or not it did. But we do know that that "presumption" is much discussed popularly, out of court. Consequently, there prevails a belief, probably well-founded, that jurors listen attentively to, and take with peculiar seriousness, the particular part of the judge's instructions defining that "presumption." On that account, I think the Fifth Circuit, in *Gomila* v. *United States*, 146 F. (2d) 372, wisely held such an instruction reversible error, although there, as here, the defendant had not objected when the charge was delivered.

My colleagues, however, differentiate the charge in the *Gomila* case because it contained a "cumulation of errors." But so, too, here. The trial judge, far from curing his

"presumption of innocence" error by his comments on "reasonable doubt," aggravated that error when he told the jury that such a doubt is one which a juror "can give a reason for entertaining." This again was matter to which the jurors probably paid close attention, since the important "reasonable doubt" principle is also often popularly discussed out of court. The judge's definition of that principle, therefore, most probably impressed the jury.

Now this very sort of instruction was severely criticized, and made the basis of reversals, by Judge Walter H. Sanborn of the Eighth Circuit. He, one of our greatest judges, was no soft "sentimentalist," eager to absolve criminals, but he was sensitive to the possible tragic impact on men's civil liberties of verdicts due to carelessly phrased statements by trial judges to juries. As he pointed out, the instruction he condemned means that the jurors must not consider any doubt about guilt unless they can articulate, at least to themselves, a sound "reason" for doing so.

Our own judicial experience teaches that sometimes even trial judges have difficulty in rationally explaining the grounds of their decisions. Some trial judges resent any obligation in jury-less cases, where the oral testimony is conflicting, to go beyond publishing laconic, unexplained, judgments, even to the extent of filing special findings of fact. Some of those judges complain that the formulation of fact-findings is too arduous and, more, bound to be artificial. I share the view that, on net-balance, that complaint is unjustified. There would be more justification for complaint, if a trial judge were required to reveal, or even to disclose that he himself knew, the "reasons" for his special findings. But there is no such requirement.

Surely, then, we ought not ask a juror who has nothing like a trial judge's experience and training, not merely to find facts but also to be able to recognize, and to make

explicit to himself and the other jurors, the "reason" for joining in a finding of fact or for any intermediate step in his mental processes. Mr. Justice Holmes, speaking for the Supreme Court, said the reasoning of an administrative body need not be thus articulate, since its decision expresses "an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions . . . which may lie beneath consciousness without losing their worth." We should not exact more of a jury. Accordingly, the jurors were badly misinstructed when told they must ignore any doubt which they could "give no reason for entertaining."

My colleagues assume, in effect, that the jurors construed that instruction as would an intelligent law student or lawyer, well-versed in the traditional meaning of "reasonable doubt." I cannot go along with that assumption. Far more probably, the jurors thought the judge meant just what he said. One can, then, well imagine that one of the jurors, when in the jury-room, impressively remarked to his fellow-jurors: "Remember that the judge especially warned us we must discard any doubt about guilt unless we can 'give a reason' for holding it." So it seems to me not at all improbable that the jurors, acting under this erroneous instruction, and incapable of formulating a rational explanation of a doubt they entertained, concluded that they had the duty to discard a doubt which, had they been properly instructed, would legitimately have yielded an acquittal. The defendants ought not bear the risk that the verdict derived from such an error.

I should add that the decisions, cited by my colleagues, of this court and of the Ninth Circuit, which (in whole or in part) disagreed with Judge Sanborn's ruling, were written when, previous to *Kotteakos* v. *United States*, 328 U. S. 750, those courts were misinterpreting the "harmless

error" doctrine. The evidence in the present case does not suffice to render the errors "harmless" within the ruling of the *Kotteakos* case. For it cannot be said, from merely reading the printed record, that the defendants are so unmistakably guilty that the jury would have been at all unreasonable if, guided by proper instructions, it had found them innocent.

POINT II

The Court's instructions as to circumstantial evidence were erroneous and unwarranted, and included references to evidence which is not to be found in the record and which had actually no existence.

After the trial judge had finished summarizing the evidence, he instructed the jury as to the effect of circumstantial evidence. In the course of these instructions he said (p. 644):

> "Thus, the Government, in so far as defendant Di Palermo is concerned, urges and with what force and effect it is for you to say, and points to the following circumstances:
>
> * * * * *
>
> That the three defendants gathered at this place at the same time not by coincidence or accident but by plan and appointment."

There was no such evidence, nor did the prosecution at any time claim that any such evidence had been introduced. Di Palermo was at the bar and grill because it was his

place of business. Sperdutto was there to keep an appointment with a butcher. There is no evidence that there was any previous understanding between the defendants. These instructions, it is to be observed, were given, not as something which might be natural if it be first assumed that the defendants are guilty, but as a circumstance pointing to their guilt. This is obviously contrary to the fundamental principles upon which circumstantial evidence is received. It is well settled that, when circumstantial evidence is relied upon to prove a fact, the circumstances themselves must be proved by evidence.

Chicago & St. P. Ry. Co. v. *Coogan*, 271 U. S. 472, 477;
U. S. v. *Ross*, 92 U. S. 281, 284;
Wigmore, *Evidence* (2d Ed.), Sec. 25, p. 226.

POINT III

The case at bar presents questions appropriate for the issuance of a writ of certiorari and review by this Court.

1. The questions as to the correctness of the charge respecting the presumption of innocence and reasonable doubt are obviously fundamental and, of necessity, are presented in the trial of every criminal case.

2. As to each of these instructions, there is a clear conflict between circuits.

CONCLUSION

A writ of certiorari should issue as prayed.

Respectfully submitted,

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FILED
OCT 24 1950
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UNITED STATES OF AMERICA,
Respondent.

Separate and Supplemental Brief in Behalf of Daniel Sperdutto in Support of Petition for Issuance of a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

PETER L. F. SABBATINO,
Attorney for Petitioner Daniel Sperdutto.

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UNITED STATES OF AMERICA,

Respondent.

Separate and Supplemental Brief in Behalf of Daniel Sperdutto

Counsel for the petitioner Daniel Sperdutto heretofore timely filed, with counsel for the two co-petitioners, Farina and Di Palermo, a joint petition for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, as well as a joint brief in support thereof.

The petitioner Sperdutto, facing a fifteen year prison term, feels, perhaps justly so, that a fuller presentation should be made to this Court of the facts upon which this application is predicated. He feels that the two short paragraphs on pages 11 and 12 of the joint petition and brief are entirely inadequate.

Counsel is mindful of the admonition of this Court that counsel display *"studied accuracy, brevity and clearness"*

in their presentations, for ready and adequate understanding of points requiring the attention of the Court (*Furness, Withy & Co.* v. *Yang-Tsze Ins. Asso.* (242 U. S. 430). Nevertheless, in order to satisfy petitioner and assure him that a complete presentation is made in his behalf, counsel urges that this supplemental brief receive the consideration of this Court.

We re-state here that the basis of the petition rests upon principles the settlement of which is of importance to the public, as distinguished from that of this particular petitioner, and upon the conflict of opinion and authority between the different Circuit Courts of Appeals (*Layne and Bowler Corp.* v. *Western Well Works* (261 U. S. 387, 393).

Fuller Statement of Facts

The importance of the questions presented to this Court in our petition and main brief is shown by the unjust result reached in Sperdutto's case, which presented activities which, at worst, were open to suspicion, but the proof of which fell far short of establishing guilt beyond a reasonable doubt.

In his summation, the prosecuting attorney argued that Sperdutto acted as a look-out (583). The Government's case against Sperdutto is based entirely upon circumstantial evidence (645-6).

The Government's proof is to the effect that on April 28, 1949, about three o'clock in the afternoon, at Di Polo's Bar and Grill, a public restaurant at 40 East 19th Street, New York City, the defendants Farina and Di Palermo sold to the Government Officers ten thousand dollars in counterfeit money for which they paid thirteen hundred dollars.

Kett of the United States Secret Service testified that he arrived in the vicinity of the Grill on April 28, 1949, at about 2:45 P. M., and stationed himself where he could

observe what was taking place on East 19th Street in the vicinity of the Grill. He observed a Plymouth automobile which was parked on the street near the Bar and Grill. He saw Sperdutto emerge from the entrance of the Grill and saw him look into the doorways and shop windows along the street. Later Sperdutto entered the Grill. These movements of Sperdutto were repeated about four times within approximately three quarters of an hour. Kett testified that he then observed Farina and Sperdutto emerge from the Grill and they proceeded toward the Plymouth automobile, the motor of which was running. Farina then entered the driver's seat of the automobile and Sperdutto seated himself alongside of Farina. Farina put the automobile in motion, and, after he had proceeded a few feet, Sperdutto alighted from the car. Kett testified that Farina drove the automobile toward him. The automobile struck a lamp post at Broadway and 19th Street. Farina and Sperdutto were then arrested in different streets (115-204).

Kett further testified that Sperdutto told him that he had an appointment at the Grill to meet a butcher who supplied the Grill with meat and that he, Sperdutto, went there to discuss terms with the butcher for supplying meat to another restaurant (175). Kett searched Sperdutto and found $600. in genuine bills in his pocket which money he later returned to Sperdutto (177).

In answer to Kett's questions, Sperdutto stated to him that he did not own the automobile and that it had been loaned to him by a girl friend of his named Scimecca (188). Perlmutter, connected with the State Motor Vehicle Bureau, testified that the automobile was registered in 1948 as belonging to Sperdutto and that the ownership was transferred to one May Scimecca on January 3, 1949 (206). May Scimecca testified that she had purchased the automobile from Sperdutto and that, on the night before his arrest, he requested her to loan the car to him on the following day,

stating that he had an appointment at the Bar and Grill (264-278).

Detectives Daggett and Motto, New York Police officers, gave testimony substantially the same as that given by Kett with respect to Sperdutto's movements in the vicinity of the Grill on the afternoon of April 28, 1949 (222-246; 246-263).

Irving Rubin, called on behalf of the defendants, testified that in April, 1949, he was in the business of supplying meat to restaurants and hotels. He knew the defendant Di Palermo. They had previously become acquainted with the fact that Di Polo's Bar and Grill was opening for business. Rubin had received orders for meat from the Bar and Grill and had made deliveries there two or three times a week. These orders had been placed by Di Palermo.

On April 28, 1949, Rubin had received a telephone call from Dan Dowd, who was Sperdutto's brother-in-law, and an appointment was made to meet Sperdutto at the Bar and Grill for the purpose of selling to Rubin some meat which had been previously sold to a school and which had been returned because the school could not use it. When Rubin reached the Bar and Grill between 2:30 and 3 o'clock on April 28, 1949, the Government agents were there. Rubin stated these facts to Kett. Rubin heard Sperdutto say to Kett: "Ask him if I didn't have an appointment with him?" Rubin told Kett that such an appointment had been made (431-466).

As already stated, the Government's claim upon the trial was that the appellant acted as a lookout (18), to warn the co-defendants of the approach of Government agents. In his opening statement to the jury the prosecuting attorney stated that he intended to establish this fact by circumstantial evidence (16).

The trial court summarized the proof against Sperdutto, whom the Court improperly treated as a look-out as a proven fact, in its charge to the jury at page 645 as follows:

"That he (Sperdutto) arrived in an automobile shortly before three o'clock; that the car was not registered in his name.

"That later he was seen talking to both Di Palermo and Farina.

"That Sperdutto was observed looking at automobiles and passersby in the neighborhood, that he went in and out of Di Palermo's bar several times and acted as a lookout.

"That after the transaction had been consummated Sperdutto left the bar in the company of Farina and went into the car with him and hurriedly got out of the car when he saw it was surrounded by law officers.

"That when first questioned concerning the automobile and its ownership, Sperdutto denied knowledge of the car, but later admitted, when Farina was brought into the bar, that the car belonged to a girl friend of his and that he, Sperdutto, had borrowed it and had given Farina the keys to drive the car."

No proof was adduced by the Government to show that Sperdutto knew that the co-defendants possessed or sold counterfeit money, or that he witnessed what took place between the co-defendants and the Government agent Lowery in the alleged sale.

The Government's claim is that the role of Sperdutto was to act as a lookout to give warning of the approach of the agents of the Government. How the appellant could have been able to detect the approach of the Government agents, who obviously would not be in uniform, was not explained upon the trial. The alleged activities of Sperdutto took place about three o'clock in the afternoon upon a busy street where he could easily have been observed by any passerby.

As already pointed out, while Sperdutto's activities may have been open to suspicion, the proof falls far short of establishing guilt beyond a reasonable doubt.

The weakness of the case against Sperdutto shows how important it was that the Court charge properly on Reasonable Doubt and the Presumption of Innocence, without any emasculating phraseology to weaken protective principles fundamental in every criminal prosecution.

We respectfully pray that a writ of certiorari should issue.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 305

JOSEPH FARINA, PETER DI PALERMO AND DANIEL SPERDUTTO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority (R. 677-682) and dissenting (R. 682-687) opinions of the Court of Appeals are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 17, 1950 (R. 688). The time for filing the petition for a writ of certiorari was extended by order of the Chief Justice to and including September 15, 1950, and the petition for a writ of certi-

orari was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether the instructions to the jury on the presumption of innocence and reasonable doubt, which petitioners accepted in the trial court, constituted reversible error.

STATUTES INVOLVED

18 U.S.C. 472 provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

18 U.S.C. 473 provides:

> Whoever buys, sells, exchanges, transfers, receives, or delivers any false, forged, counterfeited, or altered obligation or other security of the United States, with intent that the same be passed, published, or used as true and genuine, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

STATEMENT

A three-count indictment filed in May 1949 (R. 1b) in the United States District Court for the Southern District of New York charged that on or

about April 28, 1949, petitioners, with intent to defraud, possessed $10,000 of counterfeit federal reserve bank notes described therein in violation of 18 U.S.C. 472 (count 1) (R. 6), that on the same date they sold such notes to one Robert Lowery with intent that they should be passed as genuine in violation of 18 U.S.C. 473 (count 2) (R. 7), and that from a date unknown, up to and including April 28, 1949, they conspired in the commission of the offenses described in counts 1 and 2, in violation of 18 U.S.C. 371 (count 3) (R. 7-9).

Briefly, the evidence in support of the verdict may be summarized as follows:

Robert Lowery, a Secret Service Agent (R. 26) posing as a seaman (R. 80, 86), met petitioner Farina through one Phil, an informer, on February 24, 1949 (R. 87, 103). Farina, after being advised by Phil that Lowery was interested in buying $1,000.00 of counterfeit money for resale, said that he "would get it for" Lowery (R. 88-90), and within an hour brought the notes to Phil, who paid him $130.00 furnished by Lowery (R. 91, 101-102, 537-538).

On April 26, 1949, Lowery personally arranged with Farina for the purchase of $10,000 of counterfeit money for $1300.00 on April 28, 1949, the sale to take place at Farina's suggestion, at 3 p.m. at Di Polo's Bar and Grill, 40 East 19th Street, New York City (R. 27-30, 55-56) which was operated by petitioner Di Palermo (R. 434, 492, 515).

Before meeting with petitioner Farina on April 28, Lowery obtained 13 one-hundred dollar bills (R. 40), the serial numbers of which were carefully recorded (R. 122, 123, 359). Preparations were made for observing the transaction and for arresting the perpetrators (R. 136, 152). Agent Kett was in charge of a group of agents sent to Di Polo's Bar (R. 135). Three agents of the Secret Service and three New York City detectives maintained surveillance from strategic positions in the area of the bar in readiness for a prearranged signal from Agent Lowery (R. 117, 136, 152, 239, 250, 279, 335).

Before the transaction was consummated at Di Polo's, the three petitioners were observed conferring in the street in front of Di Polo's Bar (R. 223). Petitioner Sperdutto apparently had been assigned to act as the "lookout," because the officers observed him leisurely walking up and down the street peering into doorways and shop windows and scrutinizing pedestrians. This operation was repeated four times within approximately three quarters of an hour. (R. 116-117, 223, 239-240, 246-247, 280, 308-309.)

Lowery entered Di Polo's Bar shortly before the appointed hour and took a seat in the rear room (R. 31-32). Petitioner Di Palermo was observed coming out of the washroom (R. 31). Lowery saw petitioner Sperdutto come to the entrance of the rear room, peer in and walk back toward the front of the bar (R. 33).

When Lowery and petitioner Farina met, the latter was handed the $1,300, which was the agreed sale price (R. 40). At first Lowery protested giving up the money before receiving the counterfeit money in exchange, but petitioner Farina told him that the counterfeit money was around and that he, Lowery, would have it very shortly (R. 41). Farina left the table and went to the front of the bar and was out of Lowery's line of vision for a few minutes (R. 41). Farina was seen walking toward the men's room, and as he entered it, he appeared to be carrying something concealed in his left hand under his coat. The coat was bulky (R. 42). Petitioner Di Palermo joined petitioner Farina in the men's room (R. 42). Di Palermo preceded Farina out and sat on the settee just outside the men's room (R. 42). Petitioner Farina came directly from the men's room to the table where Lowery was seated and informed him that the package would be found on top of the towel container. Lowery was told to leave the bar, alone, and immediately after he picked up the package. (R. 42-43.) This was a change in plan, because before entering the men's room, Farina told Lowery he would accompany him from the bar after the transaction had been consummated. (R. 41, 43).

The package containing the counterfeit money was picked up by Lowery from the towel container (R. 43). The officers who were maintaining a surveillance saw petitioners Farina and Sperdutto come out of the bar (R. 118, 309), Lowery follow-

ing shortly after, and give the prearranged signal (R. 46, 118-119, 310). Seeing petitioners Farina and Sperdutto proceed toward a Plymouth sedan, which Sperdutto had been seen previously driving, Agent Kett and Detective Berry rushed from their observation point toward the automobile (R. 119, 132, 310, 316). Petitioner Farina was driving and petitioner Sperdutto was seated beside him (R. 118, 119, 132, 310, 316). As the car started, Detective Berry put out his hand and shouted "Stop. Police." (R. 310). Petitioner Farina saw the agents running toward the car and attempted to run them down (R. 119, 310). Petitioner Sperdutto, on the other hand, jumped out of the car and sought to flee (R. 119, 310-311). He was apprehended by Agent Motto and brought back to the bar (R. 248). Petitioner Farina raced the car through traffic, drove it on the sidewalk and hit a lamp post before he was seized by Agent Sweeney (R. 310-311, 311-312, 337).

As Agent Kett and Detective Daggett entered Di Polo's Bar, Kett announced that they were officers (R. 227). They observed Di Palermo throw the "buy money" to the floor under the table at which he was sitting (R. 121, 144-146, 225). The serial numbers on these bills corresponded to the numbers on the bills which Lowery had given to petitioner Farina (R. 122-123, 225-226).

Petitioner Sperdutto denied that he owned the car in which he had been seen driving to Di Polo's

Bar and in which he and petitioner Farina attempted to escape. He also denied knowing who owned it. (R. 187-188.) Later, he said it belonged to his girl friend who permitted him to use it (R. 188). It was shown, however, that the car had been registered in his name in 1948 and had been transferred by him to one May Scemecce (R. 207-208). The alleged transferee, however, did not know how to drive and gave conflicting statements as to the make and design of the car (R. 268-269).

The jury convicted petitioners Farina and Di Palermo on all three counts and petitioner Sperdutto on counts 2 and 3 (R. 653). Farina and Di Palermo were sentenced to imprisonment for a term of 15 years on count 1, 10 years on count 2, and 5 years on count 3, the sentences to be served concurrently (R. 667-668). Petitioner Sperdutto was sentenced to imprisonment for 10 years on count 2 and 5 years on count 3, the sentences to be served consecutively (R. 669).

Upon appeal to the Court of Appeals for the Second Circuit, the judgments of conviction were affirmed, Judge Frank dissenting (R. 682, 688).

ARGUMENT

The petition for a writ of certiorari is based principally on the arguments of Judge Frank, dissenting in the court below (R. 682, 684), that the instructions to the jury were faulty in that the presumption of innocence instruction included the statement that the presumption was "de-

signed for the protection of the innocent" and was "not intended as a bulwark behind which the guilty might hide"; and that the instruction on reasonable doubt included the statement that such a doubt is one in which a juror "can give a reason for entertaining." Our answer to the dissenting judge and to the petition is twofold. First, when the criticized phrases are restored to their context and the instructions are considered as a whole, the prejudicial possibilities which were conjured up vanish. Secondly, petitioners made no objection to the charge as given and under Rule 30, F.R. Crim. P., they are now foreclosed from complaining of a charge which they expressly accepted in the trial court.

1. Rule 30, F.R. Crim. P., expressly provides:

> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *

The obvious policy considerations underlying the rule contemplate that a defendant must make his objections when there is still time to act upon them and that he may not save them as a basis for obtaining a reversal in the appellate courts. In this case three counsel appeared for the petitioners in the trial court and heard the charge as given. At the conclusion of the charge each was afforded an opportunity to except or make additional requests.

They made it plain to the trial judge that petitioners were willing to accept the charge as given (see R. 650-651).[1] Indeed, even in the post-verdict motions there was no claim that the charge was improper in any respect (R. 654, 656-658). In these circumstances, it is clear that Rule 30 forecloses petitioners' present complaint.

We are mindful of Rule 52(b), F.R. Crim. P., which permits appellate courts to notice plain errors affecting substantial rights even though they were not brought to the attention of the court, but we think it has no application to this case. The use of a few inapt phrases in a long charge hardly fits the category of substantial error which the parties could not waive by their acceptance of the charge as given. The position which Judge Frank has taken (R. 684) overlooks Rule 30 (to which he does not refer) and erroneously, we believe, proceeds on the assumption that unless it can be said that the asserted error was harmless, it is before the court as one affecting substantial rights.[2] That view denies all meaning to Rule 30 and restores to a defendant the opportunity to remain silent in the

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[1] Mr. Chapman, who appears to have acted as spokesman for the defense expressly stated that "The defense has no requests or any exceptions to the charge as given." Mr. Solomon, another defense counsel, stated, "No requests on behalf of the defendant Sperdutto." The third defense counsel remained silent in response to the judge's invitation for requests or exceptions. (R. 650-651.)

[2] Judge Frank's view misconceives the issue. The question is not whether the asserted error was harmless under Rule 52(a). It is whether the claimed error is waived by petitioners' express acceptance of the charge as given.

trial court and then complain on appeal that portions of the charge were erroneous, as in this case. There is, we submit, no warrant for such a departure from the Rules of Criminal Procedure.

2. Assuming, *arguendo,* that petitioners have standing to challenge the charge, we submit that consideration of the challenged language in its context demonstrates that the jury was not misled.

The trial judge charged the jury in part as follows (R. 613-614):

> Under our law, all persons charged with the commission of crime are presumed to be innocent until their guilt has been established by competent evidence beyond a reasonable doubt. When a person is charged with the commission of a crime, he is not bound to prove that he did not commit that crime, but the Government must prove beyond a reasonable doubt that he did commit it.
>
> Every defendant is entitled to rest upon the presumption of innocence in his favor.
>
> The burden of establishing the guilt of each of these defendants beyond a reasonable doubt rests upon the Government, and this burden never shifts.
>
> *This presumption of law inures to the benefit of all defendants charged with crime.* It was designed for the protection of the innocent. It was not intended as a bulwark behind which the guilty might hide. If, however, the Government produces evidence which rebuts the presumption of innocence, and if the evidence

convinces you of the guilt of a defendant, beyond a reasonable doubt, then the presumption of innocence ceases to exist as to that particular defendant.

A reasonable doubt is a doubt based upon reason. It is a doubt for which a juror who says that he has such a doubt about a defendant's guilt, can give a reason for entertaining.

A reasonable doubt is not a mere guess or surmise that a defendant may not be guilty. It is not a doubt based upon a whim, caprice, prejudice or sympathy or the reluctance of a juror to perform his duty. It is a doubt that must arise from the evidence or lack of evidence in the case.

If you are satisfied, in view of the law as I have given it to you, that any of the defendants are guilty of any one or more of the crimes charged, you may say that as to that particular defendant or defendants and as to that particular crime, you have been convinced beyond a reasonable doubt. *If you waver or are uncertain of the guilt of any of these defendants as to any particular crime charged against them you have not been convinced beyond a reasonable doubt and you must render, as to that particular defendant or defendants, and as to that charge a verdict of not guilty.*

The Government is not required to prove the guilt of a defendant beyond all possible doubt, or to a mathematical certainty, because such measure of proof is ofttimes impossible in human affairs. [Italics added.]

a. The argument as to the presumption of innocence instruction is that the jury may have been misled by the words:

> It was designed for the protection of the innocent. It was not intended as a bulwark behind which the guilty might hide.

In speculating concerning the possible effect of these words, the dissenting judge overlooked the fact that the immediately preceding portion of the charge three times told the jury that the presumption attached to every defendant and that the Government bore the burden of proving the crime beyond a reasonable doubt. Read in context, we submit that the challenged language meant to the jury that the presumption is a part of our law because of our concern that an innocent man should not be convicted of a crime but that where guilt beyond a reasonable doubt has been proven, the presumption no longer obtains.

The dissenting judge's reliance upon *Gomila* v. *United States,* 146 F. 2d 372 (C.A. 5) is misplaced. The Fifth Circuit reversed there in a case which was doubtful on the evidence because of an accumulation of errors, including an inartful instruction on the presumption of innocence similar to the one here.

That the court did not consider the mere giving of such instruction ground for reversal is shown by its refusal to reverse the conviction in two other cases in which similar statements were made. *Millard C. Baker, et al.* v. *United States,* 156 F. 2d 386,

certiorari denied, 329 U. S. 763 (see the Government's brief in opposition in that case, Nos. 484-486, October Term 1946, pp. 19-23); *Pasqua* v. *United States,* 146 F. 2d 522, certiorari denied, 325 U. S. 855 (see the Government's brief in opposition in that case, No. 1047, October Term 1944, pp. 9-13); see also *United States* v. *Carruthers,* 152 F. 2d 512 (C.A. 7), certiorari denied, 327 U. S. 787; *Moffitt* v. *United States,* 154 F. 2d 402, 404-405 (C.A. 10), certiorari denied, 328 U. S. 853. In essence, the instruction was not very different from the charge approved by this Court in *Allen* v. *United States,* 164 U. S. 492, 500, a capital case. See also *Boehm* v. *United States,* 123 F. 2d 791, 811 (C.A. 8), certiorari denied, 315 U. S. 800.

(b) Similarly there is no merit in petitioners' complaint of the court's instruction that "a reasonable doubt" is a doubt "for which a juror . . . can give a reason for entertaining" (R. 614).

While a court's statement that a reasonable doubt is one for which the juror can give a reason, standing alone, might under some circumstance be questionable, it could not be thus considered here. For it was tempered by the immediately following statement, which made it unequivocally clear that it is not a doubt which a juror must justify as petitioners contend (Pet. 14-15), but only that it be a doubt which is not based upon a mere guess, whim or caprice and arises solely from the evidence or lack of evidence. Considered in its entirety, we submit

that there is no error in the instruction since it is a standard phrasing of the definition employed by many courts without challenge. See cases cited by the Court of Appeals (R. 681) and also *Freeman* v. *United States,* 158 F. 2d 891, 896 (C.A. 9), certiorari denied, 331 U. S. 805; *Murphy* v. *United States,* 33 F. 2d 896 (C.A. 3), certiorari denied, 280 U. S. 584.

To support their claim of a conflict of decisions, petitioners rely (Pet. 5) on *Pettine* v. *Territory of New Mexico,* 210 Fed. 489, 495-496, decided by the Eighth Circuit in 1912, which held erroneous, language similar to that to which they object. But the absence of a live conflict is shown by the fact that this Court has denied petitions for writs of certiorari in the *Murphy* case, *supra,* where a similar conflict was urged, and in the *Freeman* case, *supra,* where the petitioner challenged a similar instruction. Furthermore, the decision in the *Pettine* case, *supra,* as well as the even earlier decision in *Ayer* v. *Territory of New Mexico,* 201 Fed. 497 (C.A. 8), upon which the dissenting judge relies (R. 685), do not indicate that the objectionable instructions that a reasonable doubt is one for which reason could be given were there tempered, as here, by language that it is not a doubt based on mere whim, caprice or guess and by an instruction to acquit "If you waver or are uncertain of the guilt of any of these defendants" (R. 614).[3]

[3] Petitioner's final contention is that the trial court erred in its instruction when it referred to evidence not found in the

CONCLUSION

For the reasons stated, it is respectfully submitted that since petitioners accepted the charge as given and since the case does not involve a live conflict of decisions among the circuits or any question of general importance, the petition for a writ of certiorari should be denied.

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OCTOBER 1950.

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record (Pet. 16-17). The total lack of merit in this contention is obvious from petitioners' support of it by a quotation of the "erroneous" reference, which turns out to be merely an accurate summary of the Government's theory of the case and is carefully so labelled by the trial court.

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